AN INTRODUCTION TO ENVIRONMENTAL INSURANCE COVERAGE ISSUES

A. Introduction: The Best State in the Union

As a result of a number of significant appellate and trial court decisions in the last decade, Indiana can claim best state status for something besides basketball. We are the best place in the country to prosecute an insurance coverage claim for an environmental loss. This means that one of the first questions an Indiana lawyer who wants to really help a client facing any such loss should ask is Awhere are your insurance policies?@ In the past four years, Indiana policyholders represented by my firm have recovered over $160 million for such losses, even in challenging cases. Prompt and thorough attention to insurance issues is a Amust do@.

B. First Step: Ask to Look at the Policies

The most common and tragic mistake made by counsel for any policyholder which has suffered a loss is the failure to recognize potentially useful coverage. Insurers may not voluntarily or happily pay, but pay they must if you can make a good claim. Sadly, too many lawyers simply fail to ask the client to allow them to review their policies, or fail to examine the policies in a positive way. The result has been millions upon millions of dollars in claims that were payable but unmade.

Don't let this happen to you or your client. Insist upon examining all the potentially applicable coverage. This is increasingly important due to the growth of new "specialty" coverages such as pollution liability and various new first party policies.

C. Look at *All* the Policies

A common mistake is the failure to examine *all* potentially useful insurance. For example, when a pollution liability claim is made, policies going all the way back to the first use

or even the opening of the facility may apply. Depending upon the location of the claim, first party as well as third party coverages are potentially applicable. This is true even if the location of the liability or loss is not on the policyholder's property.[1]

Where can you find old policies, if your client cannot locate all applicable policies? Here are some sources:

(a) the insurer--ask them
  (1) usually do not retain
  (2) potential bad faith claim may arise
(b) accountants
(c) agent
(d) lawyer on prior claim
(e) lender
(f) customers or co-ventures
(g) past board members
(h) former employees

You need to gather any evidence of coverage. Even without a policy copy, coverage can be proved by secondary evidence (such as insurance schedules, insurance certificates, invoices, accounting or tax records, premium checks, prior claim documents and sample policies) if it is compelling.2 Insurance Aarcheologists@ are available to help. You need to find all the Alayers@ (primary, umbrella, excess) of coverage that may apply.[3]

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[1] For example, in a recent case our firm handled, the policyholder was sued for damages to an Indiana oil recycler's facility from oil containing PCBs the recycler picked up at the policyholder's facility in Pennsylvania. Applying PCB cleanup provisions in the policyholder's first party policy, we obtained summary judgment for the costs of cleanup. The policy covered the cleanup of "personal property" and the oil was "personal property" of the policyholder.

2 An important appeal which may give guidance on how much secondary evidence is sufficient currently pends before the Court of Appeals.

[3]Counsel also should look to see if Apublic@ insurance sources also may be helpful. For example,

in cleanups of old gas station sites Indiana's Excess Liability Trust Fund (AELTF@) has been

D. Basic Insurance Policy Categories

Insurance professionals generally use the term "first party" insurance to refer to policies which cover damage to the policyholder's (or other named insureds') personal or real property. "Third party" liability policies, in contrast, generally cover *liability* claims made by some third party for damage or injury.

These labels are general and in no way define or limit the scope of coverage. The insurance-buying public should be able to rely upon the broad promise of coverage in form "all risk" (first party) or third party "comprehensive general liability" ("CGL") policies insurers market. First and third party coverages may overlap and cover the same loss. Never categorize a loss in advance without examining each potentially applicable coverage thoroughly.

Policy terms change over time. What is excluded from today's policy may have been covered twenty years ago, or even last year. This is another reason why all possibly applicable policies should be reviewed. Most policies are "occurrence-based," that is they cover the claim whenever it is made if it stems from a covered act, peril, or injury which took place in the policy period. Thus, a 1975 policy period policy may respond to a liability or loss which is first claimed or discovered in 2003. In fact, the 1975 policy may be the very best policy to respond to the claim. Thus, counsel should never, ever assume that because a current policy

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created from taxes on gas storage tanks to fund environmental cleanups. Analyzing and preserving your client=s ELF eligibility are crucial here. An ELTF recovery will not relieve an insurer of its obligation under a policy, but the availability of ELTF dollars can make a claim easier to settle.

does not appear to grant coverage, earlier policies do not respond. In fact, the change in terms to exclude the matter currently may be wonderfully persuasive evidence that the prior policy does cover the matter.

One of the best pieces of advice any lawyer can give a client is to save every insurance policy it buys, forever, and that it take care to preserve every policy it can locate from earlier years. Even "claims made" policies (policies which purport to cover claims made only during the policy period) may have application or usefulness well beyond the end of that period. "Retroactive dates" in such policies may make them part of a continual chain of coverage. Changes in provisions in such policies may be useful in proving the scope of earlier coverages.

The reason a policyholder must save its policies is that insurance companies almost never do. While it never hurts to ask, disappointment typically awaits the policyholder which believes its insurer has preserved its policy. While policies can be proven by secondary evidence, that is heavy lifting, best avoided by preserving the policies.

E. The Nature of Insurance “Contracts”

It is common to find statements in judicial opinions, even in Indiana, along the lines of "insurance policies are contracts and are subject to all the ordinary rules of contract interpretation." This is not really accurate. Insurance, especially in its modern pre-printed form, is not best described as a contract. It is a product -- it is risk protection. It is not an individualized agreement, arrived at by free and open arm's length negotiations over crucial details such as those which might characterize a "real" contract. The insurance product is pre-printed in full, or nearly full, final form; generally, nothing more than the quantity purchased and the price paid are even discussed, much less negotiated. Even major insurers and their major corporate clients often do not obtain a clear understanding of what coverage is agreed upon (or

not agreed upon) until the point of claim. Very often the underwriting and claims wings of an insurer do not see the coverage in the same way. On the policyholder side, the goal is usually an aggregate sum of the "best coverage we can get" or the "typical" or "usual" or "standard" coverage. There is no real closure or meeting of the minds.

Insurance policies themselves are far too often written in language so obtuse and tortured that the very purpose seems to be confusion and uncertainty. In Indiana, that lack of clarity often is the key to the coverage issue. In this state any ambiguity is construed in favor of the policyholder and in favor of coverage. American States v. Kiger, 662 N.E.2d 945, 947 (Ind. 1996).

These and other rules of insurance policy construction respond to the reality that insurance is much more a prepackaged product than a contract. As the Kiger court reasoned:

> This strict construal against the insurer is driven by the fact that the insurer drafts the policy and foists terms upon the customer. 'The insurance companies write the policies; we buy their forms or we do not buy insurance.' American Economy Ins. Co. v. Liggett, 426 N.E.2d 136, 142 (Ind. Ct. App. 1981).

662 N.E.2d at 947.

The ambiguity rule is but an expression of the equitable sentiment in favor of coverage. Similarly grounded is the rule that unless terms in a policy are defined, they are given their ordinary meaning, as it would appear to a policyholder of ordinary intelligence. Id.; Eli Lilly & Co. v. Home Ins. Co., 482 N.E.2d 467, 470 (Ind. 1985). Where reasonably possible, an insurance policy should be construed to effectuate indemnification rather than to defeat it. Masonic Accident Insurance Co. v. Jackson, 164 N.E. 628, 631 (Ind. 1929); Lilly, 482 N.E.2d at 470. Coverage limitations should be construed narrowly; they apply only where their terms and application to the facts at hand are unmistakably clear. Masonic, 164 N.E. at 631; Kiger, 662

N.E.2d at 947. If any reasonable construction of a term supports coverage, that construction governs as a matter of law. Lilly, 482 N.E.2d at 471. The policyholder's reasonable expectations of coverage must be honored. American Economy Insurance Company v. Liggett, 426 N.E.2d 136, 141 (Ind. Ct. App. 1981); Property Owners v. Hack, 559 N.E.2d 396, 402 (Ind. App. 1990).

These and other construction rules evince a legal framework very different from that which surrounds an ordinary breach of contract claim. Policyholder counsel should not accept the "usual contract rules apply" approach to the case. Over the past two decades, Indiana's appellate courts have established what amounts to a rebuttable presumption of coverage if the claim potentially fits within the type of risk insured. The product sold was and is "all risk" or "comprehensive general" protection. That is what should be supplied unless the insurer can point to conspicuous and plain exclusions from such coverage.

F. First Party Coverage For Environmental Losses

Increasingly, policyholders have been successful in utilizing first party coverage to cover environmental damage to their real or personal property. Very often, this involves correctly characterizing what has occurred not as "pollution" or as a loss covered by one of the items included in the overbroad definition of "pollutants" in a first party policy pollution exclusion (Kiger, 662 N.E.2d 948-49), but as the sort of ordinary damage a first party policy is intended to alleviate. For a general discussion of the issues, s*ee*, Plews and Marron, "First Party Insurance and Injury Caused by Fumes: the Absolute Pollution Exclusion Should Not Bar Coverage," Journal of Insurance Coverage, 44, 45-47, 49-52 (Spring 1999). In Crown Int'l., Inc. v. Great Northern Ins. Co., Cause No. 49D12-9704-CP-522 (Marion Superior Court, March 13,1998) (which is discussed fully in the aforementioned article), the court entered summary

judgment for the policyholder in a first party policy case involving damages from acid fumes which damaged sensitive electronic products. The fumes entered the building via the ventilation system after a contractor doing surface preparation left buckets of muriatic acid under the intake vent. The court held that the pollution exclusion did not apply in part because the damage was not "pollution" as any ordinary person would understand it, but just a commonplace goof which happened to involve a chemical. This case also contains useful holdings on what constitutes a Arelease@ or Adischarge@ of pollutants an on concurrent causation.

Three other issues to watch:

(1) "Covered peril" v. "all risk." "All risk" policies cover all risks to property unless specifically excluded. "Covered" or "specified" peril policies cover only loss from those perils specifically identified in the policy. Very seldom are the policies clear in this distinction. In addition, the perils which befall a policyholder often defy or bend easy classification.

(2) Satisfaction of policy conditions. First party policies frequently have particular notice of loss, proof of loss, internal statute of limitations, and other policy conditions. Insurers generally assert any and all such technical defenses against such claims. While Indiana's courts have afforded some relief from such requirements where no prejudice has resulted, policyholder counsel should try to quash these issues by prompt compliance wherever possible.

(3) Concurrent conditions. What happens when loss resulting from a covered peril also is "caused" in some sense by a peril not covered or excluded? Many first party policies have clauses specifically addressing this situation. Sometimes this clause applies only to certain perils, a characteristic the policyholder was able

to turn to its advantage in Crown. There, certain perils, but not "wind" (which Crown persuaded the court included the indoor movement of air) were subject to exclusions barring coverage if a non-covered peril was a concurrent cause. Because "wind" was not subject to such a limitation, there was coverage even though an allegedly non-covered concurrent cause (the alleged "pollution") contributed.

G. Third Party Coverage For Environmental Liabilities

This is the type of coverage most commonly implicated in environmental claims. In the last decade our courts have resolved a number of key CGL issues[4]:

(1) Has an "occurrence" taken place? Most CGL policies cover liabilities arising from an "occurrence" during the policy period. "Occurrence" is usually defined in the policy to mean an "accident, including repeated or continuous exposure to conditions, which results in property damage or bodily injury, neither expected nor intended from the standpoint of the insured." The dispute typically centers on whether the act giving rise to the liability was an accident or intentional misconduct, which insurers typically disclaim to cover. Note, however, that "personal injury" coverage (discussed below), which covers certain specified intentional acts, may moderate this controversy. In any event, Indiana case law is fairly consistent that only certainty as to the likelihood of

[4]An appendix listing most of the significant Indiana environmental coverage decisions and summarizing their holdings is attached.

injury from the act is what may remove the action from coverage, and not the fact that the action was intentional conduct (as opposed to, presumably, non-volitional random movements). Trisler v. Indiana Ins. Co., 575 N.E.2d 1021, 1028 (Ind. Ct. App. 1991); Coy v. National Insurance Association, 713 N.E.2d 355, 358-360 (Ind. Ct. App. 1999), rehearing denied; Bolin v. State Farm Fire and Casualty Co., 557 N.E.2d 1084, 1087 (Ind. Ct. App. 1990); Ind. Farmers Mutual Ins. Co. v. Graham, 537 N.E.2d 510, 510-12 (Ind. Ct. App. 1989).

One recent case is very helpful here. PSI Energy, Inc. v. Home Insurance, 801 N.E.2d 705, 728-730 (Ind. Ct. App. 2004), transfer denied, holds that this question turns on the actual subjective intent of the policyholder, not some "objective" or "reasonable man" standard. Thus negligent or even reckless conduct is covered; only actual intent to cause significant damage is a bar to coverage.

The other common dispute here on "long tail" claims is establishing that an injury took place during the policy period, and whether coverage is limited only to the quantum of injury that arose in that period, where the injury spread across multiple policy periods. See "Allocation" discussed below.

(2) Are the costs sought to be reimbursed "damages?" A CGL policy typically promises to reimburse the policyholder for "all sums" for which the policyholder becomes liable "as damages" resulting from an occurrence. The question sometimes arises whether the amounts the policyholder is required to pay are "damages." Insurers have asserted that only sums arising from money awards or settlements are such "damages." The term usually is not defined in the

policy. Indiana's courts have held that the amounts the policyholder is required to pay -- for example, the costs of cleanup a policyholder is required to pay when an environmental agency orders the cleanup and the policyholder cleans up the site -- are such "damages." These are costs an ordinary policyholder would reasonably believe are within the meaning of "damages." It makes no practical difference whether the policyholder pays for the cleanup or whether the agency does and then sues the policyholder for the costs (except that the bill is likely to be higher since agencies generally are less efficient). "Damages" is ambiguous, and that ambiguity has been resolved in favor of coverage. Hartford Accident & Indem. Co. v. Dana Corporation, 690 N.E.2d 285, 297-98 (Ind. Ct. App. 1997) ("Dana I"), transfer denied.

Sometimes insurers argue certain costs, for example capping a waste deposit, are environmental compliance costs, or part of the "costs of doing business", and are not liability "damages." Dana I expressly holds to the contrary that "[t]he cost of containment as a remedial action taken to prevent further release of hazardous substances would be considered damages." 690 N.E.2d at 298. A recent trial court decision relied on this reasoning to hold that the costs of renting a filtration system to prevent further problematic discharges to a town's water supply until a permanent solution could be engineered are covered damages. CGB Enterprises, Inc. v. Old Republic Insurance Company, Cause No. 65D01-0602-CP-00014 (Posey Superior Court, May 15, 2002), at 8-11.

(3) Is there a "suit" which a primary level insurer must defend?

Primary layer CGL policies make two basic promises: (1) they will indemnify the

policyholder for "all sums" for which the policyholder becomes liable and (2) they will defend the policyholder against all "suits." "Suit" is undefined in the policies. What constitutes a "suit?" Is it only litigation in a courthouse? Does it include the myriad of environmental administrative proceedings businesses now face?

Dana I answers this question for Indiana. Any administrative proceeding which is coercive or adversarial in nature triggers the duty to defend. The Court of Appeals affirmed a trial court ruling which included as a "suit" even "voluntary" site cleanups in "nominal cooperation with a governmental entity, but under explicit or implicit threat of a formal enforcement action." 690 N.E.2d at 290. This is in accord with the reality confronting modern regulated entities; the best defense is often needed at the initial administrative level. Is participation in Indiana's Voluntary Remediation Program ("VRP") an alternative to an enforcement battle many Indiana businesses have pursued a "suit?" The only court to squarely address this question has concluded that because VRP participation really is an alternative undertaken to avoid an enforcement complaint and because it shares so many characteristics of a litigation, it is a covered "suit." Lear Corporation Automotive Systems, Inc. v. Allianz, et al, Cause No. 49D10-9085-CP-0729 (Marion Superior Court, December 22, 2000) at 20-22.

(4) "Personal injury" coverage. This coverage, typically distinct from "bodily injury" coverage, usually covers certain specified offenses, such as libel, defamation, and "wrongful eviction from, wrongful entry into or other invasion of

the right of private occupancy." Personal injury coverage provides separate, often higher, limits, limits that are sometimes free from Apollution@ and other exclusions. This coverage also usually obviates the need for an "occurrence."

Here again, Indiana's appellate courts have affirmed the scope and usefulness of this coverage in environmental claims. In Travelers Indemnity v. Summit Corporation, 715 N.E.2d 926, 935-940 (Ind. Ct. App. 1999), the Court of Appeals held that such coverage applies to a broad range of environmental cleanup claims, since these claims involve allegations of "wrongful entry" or "invasion of the right of private occupancy" by contaminants. In Allstate v. Dana Corp, 739 N.E.2d 1049, 1056-57 (Ind. 2001) (“Dana II”), the Supreme Court trimmed the range of terms used in personal injury clauses which might apply to environmental claims, holding that “invasion of privacy” did not apply to such claims, and “wrongful eviction” would apply only in claims involving a tenancy. However, although insurer amici asked the court to overrule Summit on “wrongful entry” and “invasion of the right of private occupancy”, the court declined to do so.

(5) Allocation when multiple policies are triggered. A CGL policy assures its purchaser that it will pay "all sums" for which a policyholder becomes liable arising out of a covered occurrence. It does not say that it will cover only that portion of the total liability attributable to injury in the policy period if the injury continues into other policy periods. Policyholders have argued this means they should be able to select which policies to use to pay a claim if multiple

policies are triggered so as to maximize the benefit of the insurance they purchased. The policyholder may, for example, wish to save some policies for other claims or to avoid insurer insolvencies or periods which have high self-insured retentions. Insurers disagree, and have asked courts to "equitably allocate" losses among all triggered years, even if this results in less protection for the policyholder as amounts are allocated to years which are exhausted or have high self-insured retentions.

Indiana's Supreme Court came down squarely for the policyholder on this question in late 2001 in Dana II. The Court stressed the lack of any provision limiting the stated responsibility for "all sums" the policyholder is required to pay. This is a very helpful rule for policyholders. Now lost policies, high self-insured retentions, or policy exhaustion are no longer barriers to a complete recovery.

(6) Is the liability excluded from coverage as a previously "known loss?" In General Housewares Corporation v. National Surety Corporation, 741 N.E.2d 408 (Ind. Ct. App. 2000), the Court of Appeals held that for a liability to be excluded from coverage as a previously known loss the policyholder must have been "substantially certain" the liability would be imposed at the time the policy was purchased. This dispute generally arises only in "long tail" claims. The policyholder may rebut this defense by proving disclosure to the insurer prior to issuance of the policy.

(7) Pollution exclusions. In environmental claim cases two form pollution exclusions typically are relevant. In policies from roughly 1971 through

1985, the "standard" exclusion purported to bar coverage unless the release of pollutants was "sudden and accidental." After 1985 most policies contained "absolute" pollution exclusions, purporting to exclude coverage for any claims arising from "pollutants," whether or not "sudden and accidental" releases were involved.

In Kiger and a subsequent decision dealing with the duty to defend, Seymour Manufacturing v. Commercial Union, 665 N.E.2d 891, 892 (Ind. 1996), the Indiana Supreme Court construed the standard form, or "sudden and accidental," exclusion in a fashion favorable to policyholders and held that the absolute exclusion was so over-broad as to be unenforceable. The word "sudden" in "sudden and accidental" is ambiguous since it means "unexpected", as policyholders pointed out, as well as "all at once", as the insurers claimed. Thus, the exclusion does not bar a claim in which contaminant releases occurred over a number of years -- the vast majority of environmental claims -- so long as the releases were unexpected. The releases do not, in other words, have to be all at once, as insurers had argued.

The problem with the absolute exclusion is the extraordinarily broad definition of "pollutants", which, if read literally, would bar any claim involving any chemical and render the coverage illusory. The Kiger court refused to apply this exclusion to a gas station claim, and Summit, Freidline v. Shelby, 774 N.E.2d 37 (Ind. 2002), and other subsequent cases have confirmed that, as a result of its overbreadth, the exclusion is essentially unenforceable as to multiple other sorts of claims.

(8) Owned property exclusion. Most CGL policies contain an exclusion for claims for damage to property owned by the policyholder. Dana II holds, however, that the typical on-site contamination claim is not barred by this exclusion. 759 N.E.2d at 1055-56. Dana II adopts the reasoning of the Seventh Circuit in Patz v. St. Paul Fire & Marine Insurance Co., 15 F.3d 699, 705 (7th Cir. 1994). In Patz Judge Posner held the exclusion generally inapplicable to environmental liability claims because such claims, even if they mandate cleanup on the policyholder's property, do not arise to add value to the property or compensate the policyholder, but to abate a nuisance. Only if such owned property is excluded in the coverage clause (a rare form found in a few London and Home policies), so that coverage never attaches, will such claims be blocked. 759 N.E.2d at 1054-55.

(9) Late notice. CGL policies generally require prompt notice of any claim. Largely because insurers proclaimed they did not cover environmental and other long tail losses, and due to the delayed nature of such claims, policyholders' notification of claim to insurers was or often is delayed. Even unreasonably late notice does not automatically defeat a claim, however. Late notice merely erects a presumption of prejudice, which is rebuttable. Once evidence of a lack of prejudice is introduced, the issue of prejudice becomes one for the trier of fact, and the insurer must show actual prejudice. Miller v. Dilts, 463 N.E.2d 257, 265-68. Such actual prejudice is difficult to establish where, as in most environmental cases, insurers relied on pollution exclusions and other form term interpretations (e.g., no "damages", no "suit") to deny claims, usually with no investigation at all.

The nature of the claim also is crucial in the determination of whether actual prejudice is found. Environmental claims differ from auto accidents in that the injury in the former is expressed and preserved in microscopic data presented through expert analysis, not eyewitness testimony that may fade or be lost. Contractors United v. Commercial Union, Cause No. 49C01-9406-CP-2003 (Marion Cir. Ct., October 27, 1999), at 28-29.

(10) Voluntary payments. CGL policies proscribe reimbursement of payments made "voluntarily" by policyholders. Insurers sometimes claim cleanup agreements are not covered because they were made "voluntarily" by a policyholder. The same clause is sometimes used to try to avoid payment for defense expenses incurred before notice to the insurer, or “pre-tender” expenses.

There is no presumption of prejudice here; actual prejudice must be shown by the insurer. Miller, 463 N.E.2d at 261. Dana I affirms coverage even for "voluntary" cleanups when they are undertaken under the explicit or implicit threat of formal enforcement action. More recent cases affirm this protection for participation in Indiana's Voluntary Remediation Program. Lear v. Century Indemnity, et al., Cause No. 49D10-9805-CP-000729 (December 22, 2000). Another recent case affirms the requirement that insurer must show prejudice to avoid payment of pre-tender costs. Heritage Environmental Service, LLC v. Sentry Insurance, Cause No. 49F12-0112-CP-004803 (Marion Superior Court, December 18, 2002).

(11) Contribution. An issue not yet directly addressed by Indiana's appellate courts is whether or not insurers should be able to obtain contribution

from other insurers which previously have settled with a policyholder when they are hit with "all sums" liability, especially when the effect of contribution would be to reduce the policyholder's actual recovery to less than a complete recovery for the loss. The insurers' claim is a derivative of their "equitable" allocation argument, that a carrier should not have to bear a "disproportionate" amount of the loss, even when it was recalcitrant and declined to pay the claim without a lawsuit.

Policyholders, on the other hand, argue that where there is joint and several liability among defendants, liability of a nonsettling defendant is reduced at most on a *pro tanto* (that is, only by the amount received in settlement), not a *pro rata*, basis. See Manns v. State Dept. of Highways, 541 N.E.2d 929, 932 (Ind. 1989). This system of taking account of settlements also is used in Superfund. See 42 U.S.C. 9613(f)(2) (ASuch settlement does not discharge any of the potentially liable persons unless its terms provide, but it reduces the potential liability of the others by the amount of the settlement@). *Pro tanto* reduction encourages settlements, avoids double recovery, and avoids rewarding the recalcitrant contract-breacher.

Contribution is an equitable remedy. Where the insurer seeking contribution has been in breach of its contractual obligation to its policyholder, Indiana law should refuse to allow use of that remedy. See Farm Bureau Mutual Insurance Co. v. Dercach, 450 N.E.2d 537, 542 (Ind. Ct. App. 1983) (equitable right to subrogation waived by insurer's unreasonable delay in satisfying its obligations under the policy); Stewart v. Jackson, 635 N.E.2d 186, 189 (Ind. Ct.

App. 1994). It is fundamental that "one who comes into a court of equity must come with clean hands." Traylor v. By-Pass 46 Steak House, Inc., 285 N.E.2d 820, 822 (Ind. 1972).

In the only reported case decided under Indiana law relating to contribution from other carriers, the D.C. District Court held in Eli Lilly & Co. v. Home Insurance Co., 653 F.Supp. 1, 10 (D.C.D.C. 1984), aff=d 794 F.2d 710 (D.C. Cir. 1986), that Lilly could not "stack" policies horizontally, that Lilly could instead select the policy year it wanted to cover a claim and then recover all the monies due on that claim from that year's policies. In reaching a "no stacking" holding, the D. C. District Court emphasized that the primary goal was to ensure that the policyholder is indemnified in full. While Lilly contemplated reallocation via "other insurance" clauses, it expressly stated that such allocation may not weaken the "primary duty" of triggered insurers "to ensure that [the policyholder] is indemnified in full."

Other jurisdictions hold that a policyholder is entitled to pick which carrier of many it wants to cover him and, when that is done, his selection bars a contribution action back against his own other carriers. See, John Burns Construction Company, et al. v. Indiana Insurance Company, 727 N.E.2d 211, 214 (Ill. 2000). The Illinois Supreme Court found that the question before it was as follows:

> Whether an insurer to whom litigation is tendered and whose policy contains an other insurance clause like the one above may seek contribution from another insurer whose policy is in existence but whose coverage the insured has refused to invoke.

After citing no less than three cases, the answer was Ano.@ A policyholder is allowed to pick his insurer. Prohibiting contribution Ais intended to protect the insured=s right to knowingly forgo an insurer=s involvement.@ John Burns Construction, 727 N.E.2d at 215.

Appellate courts in other states have begun to reach further pro-policyholder results on this issue. See, e.g., Weyhauser Co. v. Commercial Union Ins. Co., 15 P.3d 115, 126-27 (Wash. 2000) (strong public policy encouraging settlement puts burden on insurer to prove portion of full buyout of policy settlement attributable to known environmental claims in case--in other words, full amount of settlement may not be deducted even *pro tanto* for non-settling insurers); Insurance Co. of N. America v. Kayser-Roth Co., 770 A. 2d 403, 413, 414 (R.I. 2000)(same).

One Indiana trial court addressed this issue last year, and ruled for the policyholder. In Aetna Casualty and Surety Company, et. al, Cause No. 49D12-0102-CP-000243 (July 15, 2002), the Court held that because an insurer's contribution claim is derived from its subrogation rights of its policyholders if the policyholder settles away its rights against another insurer in settlement, the non-settling insurer has lost any right to which it may subrogate. This decision was appealed, but the appeal was dismissed.

(12) Defense Costs. Indiana's Supreme Court has held that a policyholder is entitled to recover these costs, as a matter of law, if there is any possibility of coverage for the claim even if there may be valid defenses to

indemnity. Seymour Manufacturing Company v. Commercial Union Insurance Company, 665 N.E.2d 891, 892 (Ind. 1996). The Court noted that "an insurer's duty to defend…is broader than…its duty to indemnify," and directed entry of summary judgment for the policyholder despite the existence of pollution exclusions and other defenses. Recently courts have entered summary judgments for specific amounts of past defense costs. *See*, e.g. Lear and Heritage Environmental Services. In-house corporate attorney defense costs also may be recovered. Dana, Cause No. 49D01-9301-CP-00026, (Marion Superior Court, August, 1997). One issue which often arises is whether environmental consultant costs can be recovered as defense costs. The strongest case can be made for such costs incurred in evaluating the scope and extent of contamination and the opposition's proposed remedy; remediation costs are more likely to be characterized as indemnity, not defense costs. *See* Employers Insurance of Wausau v. Recticel Foam Company, 716 N.E.2d 1015, 1027 (Ind. App. 1999) ("the nature of the expense is a question of fact").

(13) Prejudgment Interest. If an insurer breaches its defense or indemnity obligations, and the policyholder has to pay these costs, an award of prejudgment interest is necessary to put the policyholder in the same position as though the breach had not occurred. In several recent cases (CGB and HES) policyholders have recovered such interest. In HES, the policyholder recovered such interest on pretender expenses. This is a right policyholder counsel should not overlook.

(14) Lost Policies. Because environmental claims typically involve

insurance policies purchased many years before, policyholders sometimes do not have copies of all potentially applicable policies. While Dana II's allocation holding means only one policy may be enough, multiple policies can be very useful to provide sufficient funds to address the problem. Insurers almost never retain their customers' policies, so it is up to the policyholder to prove it had coverage.

The PSI case is an important new decision on this issue. 801 N.E.2d at 717-722. It holds that a policyholder can use "secondary" evidence--cancelled checks, policy schedules, declaration pages, oral testimony, policy forms, underlying or succeeding policies and the like--to prove the basic terms of the policy. The policyholder need only prove the essential terms, and not the verbatim contents of the policy. Expert testimony about the likely content and use of industry forms also can be used to fill the gaps. This should preclude insurers from benefiting from their lack of retention of policies.

H. Reinsurance and Retrospective Premium Issues

Reinsurance companies accept a portion of the risk incurred by the "lead" companies (the company from which the policyholder obtained the policy) in exchange for part of the premium. Ordinarily a policyholder has no or very little contact with reinsurers. A reinsurer's relationship with the insurer is governed by a separate contract, which typically has non-judicial dispute resolution provisions. Typically, "coverage" issues are not the crux of any dispute between reinsurer and the lead carrier; usually, all are bound by the determination of coverage under the primary policy. Instead, issues of underwriting, administration, or disclosure are the points in dispute.

Retrospective premium arrangements typically allow a policyholder to present itself as insured when it really is maintaining a form of self-insurance. Under a retrospective premium arrangement if a claim is paid the amount paid is included in a later premium billing (usually with an additional administrative fee). This is an incentive for the policyholder not to make a claim.

Not all retrospective premiums are for the full claim sum. Some have declining percentages of repayment based on the time that has passed after the original policy period. Obviously, a sophisticated understanding of the arrangement in place is needed to properly address a policyholder on a claim involving such a policy.

Such policies also must be correctly understood for proper allocation to be made. They should be regarded as uninsured or self-insured periods, and no damages should be allocated to them. Allocation to those periods would undermine the value of the Aall sums@ full freight insurance the policyholder purchased for other years.

I. Coverage Litigation--The Process

Most serious coverage disputes are resolved through a declaratory judgment action filed by either the policyholder or one or more of the insurers. In this section, I discuss the important central steps to be taken in such actions.

(1) When to File a Coverage Action.

Usually the policyholder's interest in a coverage dispute is in a prompt resolution of the matter to get the claim paid. Thus there is little percentage in waiting for every insurer involved to make their predictable denial of coverage. Given the importance of forum and law selection, as discussed below, there are significant risks in waiting too long to file.

Still, there are advantages to making the claim before you file an action. Insurers gain some psychological edge, at least initially, if they are able to tell a court their first notice of a claim was a summons. Besides, making the claim is simple. A short statement of the claim, a request for indemnity and defense under all applicable policies, and a request for a prompt response are all that is necessary. Such notice preferably should be sent to all potentially applicable insurers.

Satisfactory settlements prior to litigation are very rare. I have found that insurers, which are regularly involved in litigation in their day-to-day business, seldom take a claimant with a controversial claim seriously unless the policyholder demonstrates a willingness to litigate. There is little point to waiting for what are often long-delayed responses to notice letters. Filing suit after a decent interval is the prudent course.

(2) Where to file a coverage action.

Because most coverage issues are resolved or may be resolved as matters of law, the choice of judge and forum is absolutely critical. Policyholders typically prefer a strong judge who is intellectually engaged and interested in the kind of language and public policy questions that are involved in coverage cases. Summary judgment is an important tool in this kind of litigation, so the ideal judge is confident and comfortable in using summary judgment in narrowing issues and clarifying the case. Discovery disputes are inevitable. Insurers vigorously fight discovery into their practices and representations, and policyholders will need the court's aid in digging out essential information. A strong, engaged judge with a lively mind is absolutely critical.

As plaintiffs, policyholders typically have some initial forum selection control. The options available should be examined very carefully, not just on initial judicial

assignment but on the usual forum selection (jury makeup and likely response to key issues, etc.) criteria.

The choice of law is equally crucial. Insurance law is a state by state determination. Indiana's law may be very different from Ohio or Illinois law on decisive issues. The case should be filed where there is the greatest chance of getting application of the most favorable law. In cases involving claims in several states where the policyholder operates in several jurisdictions, there are multiple options.

For policyholders, based on the above and other cases, Indiana law is very helpful. Thus securing application of Indiana law is extremely important. The first essential step in the process is filing first in an Indiana forum. Absent a conflict of law, the forum is to apply its own law. If there is a conflict, the court is to decide which state has the most significant relationship to the matter under the criteria set forth in '' 188 and 193 of the Restatement (Second) of Conflict of Laws. There is substantial recent Indiana appellate jurisprudence on choice of law in complex coverage cases.

In Dana I, Summit and Recticel the Indiana Court of Appeals, on varying grounds, held that Indiana law applied to all the claims involved in those cases. The key is the Indiana connection to the matter. For example, in Dana more clean-up sites were located in Indiana than in any other state. 690 N.E.2d at 291-94. On the other hand, in Summit, the client was headquartered in Connecticut and the largest site was located in Connecticut, but more clean-up sites were located in Indiana than any other state (even though the total dollar clean-up value of those sites was less than for the sites in Connecticut). 716 N.E.2d at 930-933. Finally, in Recticel, during a significant period of time Recticel's corporate headquarters and one of its plants were located in Indiana, even

though the claim involved only a plant in Tennessee. The connecting principle in these cases is that Indiana courts will apply Indiana law if there is a significant Indiana connection to the cases.

Sometimes insurers also seek dismissal of the case on the grounds of forum non conveniens, arguing the case should be heard in some other forum. This doctrine permits a court to dismiss a case in favor of proceeding in another state if trial in Indiana would work a substantial injustice due to the unavailability of or inconvenience to key witnesses or evidence. In both Dana I and Recticel the Court of Appeals sustained trial court denials of such motions. A similar insurer motion on ground of "comity" was defeated even though the case in another state was filed first; the sole cleanup site is here, and so Indiana's connections are superior. Pulse Engineering v. Federal Ins. Co., et al, Cause No. 49D13-0408-CT-1427 (Marion Superior Court, June 7, 2005). The plaintiff's choice of forum is accorded great weight unless the plaintiff has absolutely no connection to the forum. If there is any substantial connection to Indiana, the case will stay here.

(3) First Phase -- Case Management Plans, Master Policy File, and Discovery

In the early 1990's the initial phase of coverage litigation would involve dispositive motions to test the construction of various policy provisions. Now Dana I, Kiger, Seymour, Summit and a host of other cases have resolved many policy interpretation issues. While counsel should always be on the alert for opportunities to narrow issues, the most useful first step in current coverage litigation is to set up the case for efficient litigation. Typically this will involve creating a Case Management Plan ("CMP") with a schedule of how the case will be prepared for trial. The CMP covers a range of items in a somewhat broader fashion than the more traditional pretrial order.

One key item it usually addresses is the creation of a Master Policy File so that the parties can attempt to reach consensus -- or at least identify any issues to be resolved -- about the precise terms of the policies involved. In complex cases with dozens of insurers this is an enormous task that may never be completed. But the plaintiff needs to create at least its version with the court so that common reference points can be established and any "lost" policy issues can be addressed.

Two levels of discovery proceed. The first is directed at the policyholder and covers the predictable queries about the claim. Insurers are aiming to find any evidence they can use to suggest that the policyholder knew damage would result from its actions, or to locate anything it can claim now is "crucial" evidence lost by the passage of time so as to buttress a late notice claim.

Policyholders are looking to establish other claims. Information about underwriting may be critical to assess what limits exist for the coverages at issue. Claims information, including that about other policyholders involved in similar claims, may be used to rebut a claim of prejudice from late notice by showing a lack of investigation and/or denial of coverage based upon policy defenses (defenses now diluted or eliminated by Kiger, Dana I, Summit and similar cases). Discovery also may disclose knowledge about the claims or about the policyholder's business which may eliminate certain defenses. Drafting "history" may help the policyholder establish ambiguity or otherwise undermine the insurer's claims. Kiger, 662 N.E.2d at 947-48. "Loss control" information (insurer advice to policyholders on how to control or avoid risk) may be useful in establishing common practice and estopping insurers (for example, insurers used to advise policyholders to dispose of solvents by spreading them on the ground and

letting them evaporate, practices that may cause contamination). Reports to reinsurers and reserve information similarly may disclose, in settings in which the insurer must be candid, information about the claims.

Discovery in these cases can become quite contentious. To the policyholder it often seems the insurers' strategy is to wage a war of attrition, seeking to depose hundreds of witnesses with no or only tangential knowledge, mostly to wear down the policyholder and string out the case. To the insurer the policyholder seems to want to hide the careless nature of its past practices. Counsel need to be prepared for motions to compel and protective order requests. The danger for counsel is to over-use or loss of credibility with the court.

(4) Second Phase -- Experts, Mediation and Dispositive Motions

Expert witnesses typically play an important in these cases. Not so much in the legal areas of coverage, which ultimately are for the court, but upon the questions or standards raised by the claims and defenses. Was the policyholder's conduct in accord with the practices and requirements of the time? Was the damage expected or intended? When did the damage occur? Were the remedies negotiated reasonable? Experts are needed on all these and other points in any complex coverage case, and upon their persuasiveness the entire case may turn.

Other non-testifying experts may play key roles. For example, both sides in a pollution liability case start with some disadvantages: insurance company versus polluter. Certain jurors are better able to understand the recent evolution of environmental management and to more fully understand why yesterday's practices (though outdated today) do not brand a company a polluter who should be "punished" by

not being allowed the benefit of the insurance it purchased. Either side may have local appeal, or problems. Jury selection experts can be very helpful.

Partial summary judgment motions can narrow issues and clarify the case for mediation. The duty to defend, and the amounts due, are suitable for such treatment. Certain other terms may be construed so as to give the parties an indication of how much risk or exposure exists. While many issues now have been resolved, the next generation of questions are only now emerging. Particular factual situations may require dispositive motion resolution. These motions have quite literally saved years of trial time. Counsel should make every effort to use such motions creatively.

Mediation has proved exceptionally successful in Indiana coverage cases. On the whole insurers are rational, calculating litigants. So are their corporate adversaries. Especially in multiple party cases, where settlement issues are complex, the number of potential contributors typically means the loss can be spread to lessen the burden on any one insurer. With "all sums" and contribution reallocation decided in favor of policyholders, the pressure to settle such claims upon insurers is intense. If you believe insurers should indemnify whenever possible, Masonic, 164 N.E. at 470, that is a good thing since it discourages recalcitrants.

Mediation forces all parties to contemplate the risk of trial, and it forces principals to examine and justify their positions. That, and even the slight inconvenience of the process, inspire settlements, a result that in the end saves money for everyone.

The mediation statement should be taken seriously, and the presentation made as clearly, logically and forcefully as it would be at trial. Often principals simply have not had the time nor have they been required to take into account particular factors (such as

Indiana law on specific issues) that should affect their positions. The mediation statement can force them to do so.

Care should be given to the sequencing of mediation. Sometimes group sessions are best; sometimes subgroups are more effective, especially in follow-up sessions. The policyholder should develop a plan that is designed to maximize the chance of settlement in a fashion that protects the case going forward as well. Often mediation will clarify such strategic thinking.

The mediation process also can be useful to resolve information issues and questions. Policyholder counsel should consider a preliminary session to provide answers about such topics as past or future costs or remedies.

Each mediation has its own dynamics, but at the very least they crystallize the issues that divide the parties which do not settle. Ultimately the process has resulted in the settlement of almost all claims.

(5) A note about bad faith claims.

Indiana's Supreme Court has affirmed that there is a separate remedy for bad faith treatment of the policyholder in addition the contract breach claim. Erie Ins. v. Hickman, 622 N.E.2d 515, 519 (Ind. 1996). The Court made a few points about the nature of the claim, but left its full development to future cases. In general terms, most courts have found that insurers owe a duty to treat their policyholder fairly and not to advance their own interests to the exclusion of their policyholders. The policyholder, it is sometimes said, is entitled to good faith and "equal consideration" of its interests.

Recently the Supreme Court applied this standard in an environmental coverage case. In Freidline v. Shelby Ins., 739 N.E.2d 179, 184-85 (Ind. Ct. App. 2000), the Court

of Appeals found bad faith as a matter of law where an insurer continued to assert an absolute pollution exclusion defense against a policyholder in a fume injury case after the policyholder cited Kiger to the insurer. The Supreme Court reversed this summary judgment, 774 N.E.2d at 43, but affirmed the liability holding that the absolute exclusion did not bar coverage. The Court decided that the absolute pollution exclusion law was till evolving, so the insurer's denial was not bad faith; it seems unlikely a future insurer would be protected if it relies on the exclusion, however. Counsel should be alert to bad faith claims in coverage cases. In other states this remedy already has played a much more prominent role than it has thus far in Indiana.

(6) Final Phase -- Trial and Settlement Options

Coverage trials are like any other trials, but more so! Given the somewhat dry nature of the core document, the policy, the quest to obtain and retain the jury's focus is even more crucial here. Technically complex claims demand colorful simplification. Natural disadvantages (insurer versus polluter) should be attended to, because in the end juries have a tendency to try to figure out who "deserves" the verdict. For the policyholder, the goal is protection--for which the policyholder paid ample premiums--against unexpected liability or damage, which ought not to be confused by attempts to superimpose today's labels to past conduct.

Policyholders should resist bifurcating or other segmenting of the case. It is twice as costly and more than twice as confusing. It also tends to promote compromise verdicts.

If multiple coverages may apply to the same claim, there may be room to make everyone happy since no carrier must pay 100% of a claim. Coverage "buy-outs" may be

attractive to carriers, who may be willing to pay a set dollar amount now rather than incur uncertain, potentially much higher risks in the future as new claims come in and as coverage law develops in favor of policyholders. Coverage actions are expensive and risky for carriers. Continuing or potential future business may afford leverage for policyholders. Devices similar to loan receipts in multiple defendant cases may have utility here. The only limits to the assistance counsel can give are the counsel's persistence and imagination.

J. A Note on Insurance Products Useful in Environmental Cleanups

The insurance industry has developed a number of new products that may have utility in environment cleanups. Often the professionals involved in cleanup--consultants and contractors--have special Aerrors and omissions@ or contractor liability coverage which may cover mistakes that aggravate or delay cleanups. Insurers now also offer policies to protect against other losses in the cleanup process such as lender loan protection and cost overrun protection policies. AManuscript@ (individually written) as well as form policies may be available. Some insurers have made tremendous profits in environmental coverages. Often the coverages are very limited. Working with an experienced environmental insurance professional is essential to protect clients here.

K. Conclusion

Find the policies. Make the claim. File the case. Prepare it well. Use mediation. Your client, and you, will benefit enormously.